IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

FRIDAY, THE 27TH APRIL 2007 / 7TH VAISAKHA 1929

WP(C).No. 29792 of 2003(V)

PETITIONERS:
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1. K.PRABHULLAKUMAR, ARMED POLICE SUB IINSPECTOR , KERALA ARMED POLICE 5TH BATTALLION, MANIYAR CAMP, PATHANAMTHITTA.

2. V.VISHNUKUMAR, ARMED POLICE SUB INSPECTOR, S.B.C.I.D.,PATTOM, THIRUVANANTHAPURAM.

BY ADV. SRI.C.P.SUDHAKARA PRASAD (SR.)
SRI.ELVIN PETER P.J.
SRI.S.RAMESH
SRI.P.N.SANTHOSH
SRI.S.D.ASOKAN
SRI.NAVEEN.T

RESPONDENTS:
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1. THE HOME SECRETARY, HOME DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM.

2. THE DEPUTY INSPECTOR GENERAL, A.P.BATTALLION, THIRUVANANTHAPURAM.

3. THE COMMANDANT, K.S.P.BATTALLION, THIRUVANANTHAPURAM.

4. THE DEPUTYINSPECTOR GENERAL(SECURITIES), SPECIAL BRANCH CID, SECURITY WING, THIRUVANANTHAPURAM.

***5. THE DIRECTOR GENERAL OF POLICE, TRIVANDRUM.**

6. THE COMMANDANT, K.A.P,
4TH BATTALION, MANGATTUPARAMBU,
KANNUR.

***ADDL. R5 AND R6 ARE IMPLEADED AS PER ORDER DATED 28/12/2004 IN IA NO. 17620/2004.**

BY GOVERNMENT PLEADER SRI. D.ANIL KUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 08/11/2006, THE COURT ON 27/04/2007 DELIVERED THE FOLLOWING:

WP(C) NO: 29792/2003

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1. COPY OF THE ORDER, IGO NO. 237/89 DT. 13/4/89 BY THE I.G OF POLICE.

EXT.P2. COPY OF THE ORDER DGO NO. 552/90 DT. 31/07/90 ISSUED BY THE DGP.

EXT.P3. COPY OF THE ORDER GO NO. 557/90 PC DT. 7/8/90 ISSUED BY THE DEPUTY COMMISIONER OF POLICE.

EXT.P4. COPY OF THE ORDER NO. A1(A)/7849/98/APB DT. 25/09/98 OF THE DIG OF POLICE.

EXT.P5. COPY OF THE S.O. NO. 113/98/APB DT. 3/10/98 BY THE DIG OF POLICE.

EXT.P6. COPY OF THE ORDER S.O. 52/93 DT. 5/6/93 BY THE DEPUTY INSPECTOR GENERAL OF POLICE AP BATTALIONS.

EXT.P7. COPY OF THE ORDER NO. L1/105117/2000, DT. 23/12/2004 BY THE DGP, KERALA, THIRUVANANTHAPURAM.

EXT.P8. COPY OF THE PROFROMS OF WILLINGNESS SUBMITTED BY THE P1 ON 29/10/87.

EXT.P9. COPY OF THE PROFORMS OF WILLINGNESS SUBMITTED BY THE P2 ON 29/10/87.

EXT.P10. COPY OF THE ORDER B.O. NO. 346/90 PASSED BY THE COMMANDANT, SAP.

EXT.P11. COPY OF THE MEMO OF CHARGES ALONG WITH THE STATEMENT OF ALLEGATIONS DT. 27/3/2006 ISSUED TO THE P2.

True copy

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K.M.JOSEPH, J.

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WP.(C) No. 29792 OF 2003

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Dated this the 27th day of April, 2007

JUDGMENT

Case of the petitioners in brief is as follows:

First petitioner was appointed as Police Constable in the Special Armed Police (hereinafter referred to as SAP) on 12.9.1984. He was promoted as Havildar after he passed the Havildar Test, with effect from 18.10.1986. Second petitioner was also recruited as Police Constable in the SAP on 12.9.1984 and he was promoted as Head Constable after he passed Havildar Test with effect from 1.10.1988. They were confirmed as Police Constables and had become full members of the category of Police Constables and they have a lien in terms of the judgment of this court reported in B**alakrishnan Nair v. Ram Mohan Nair** (1998(1) K.L.T. 766). Government issued order dated 7.6.1968 providing that the Havildars shall be transferred to the District Armed Reserve (hereinafter referred to as DAR) only if they opt to be reverted as Constables. In Ext.P1, it is, inter alia, stated as follows:

"The Commandants of Armed Police Battalions will

> obtain an undertaking from the Head Constables/Havildars transferred to Armed Reserve to the effect that they are willing to be transferred on reversion as Police Constable and the same should be pasted int he Service Book before they are passported to Armed Reserve."

The additional fifth respondent, Director General of Police issued Ext.P2 order providing for transfer only after getting undertaking. It is the further case of petitioners that violating the said orders and without getting any written undertaking from the petitioners, but on the basis of mere willingness, they were transferred to the DAR along with others vide Ext.P3 order dated 7.8.1990. It is further stated that on the basis of Ext.P2 order, petitioners were reverted as Police Constables from the category of Havildars and they were admitted to duty in the DAR, Thiruvananthapuram City. They were promoted as Head Constables in the DAR as per order dated 25.10.1995. The lien of the petitioners as Police Constables in the SAP was not terminated even after they were transferred. In terms of the decision already referred to, they are entitled to be reverted back invoking their lien. They also plead that they were transferred in violation of Exts.P1 and P2 and, therefore, it is

liable to be cancelled as it is illegal. They made representations. On the basis of the same, Ext.P4 order is passed and they joined duty as Havildars in the SAP. By Ext.P5, petitioners were promoted as Armed Police Sub Inspectors in the SAP. They arer working for the past five years as Sub Inspectors. It is stated that it is understood reliably that certain juniors of the petitioners in the category of Havildar in SAP moved the second respondent, Deputy Inspector General, and orders were issued transferring the petitioners to the DAR. The prayers sought for by the petitioners are to quash the order transferring the petitioners to DAR, to declare that they are not liable to be transferred without consent and willingness, and that the transfer of the petitioners as per Ext.P4 is legal. The writ petition was amended. As per the same, they have produced Exts.P6 and P7 and sought to quash Ext.P7. Ext.P7 is the order reverting the petitioners to DAR as Head Constables. It is pointed out that there is non-application of mind in passing Ext.P7. Ext.P6 is an order relied on by the petitioners to show that the petitioners were only given the same treatment as was given to one Sri. V.Sreekantan Nair. Sri. Sreekantan Nair was also transferred

back to the Armed Police Battalion as Havildar. It is stated that while Sri. Sreekantan Nair is allowed to continue in the Battalion as Armed Police Sub Inspector, the petitioners are sought to be reverted. In Ext.P7 it is stated that the transfer of the petitioners is a fraud committed on the department. It is further stated that they were also transferred back to the Local Police conferring them their original seniority in the Battalion. It is stated that they submitted petitions to the effect that they were trransferred to the AR Camp without complying the stipulations in the Government Order concerned and without obtaining their written undertaking duly countersigned by a responsible officer and that were not incorporated in their service book. It is stated that on verification it is found that they had actually submitted willingness. It is further stated that the transfer of the petitioners from the Local Police strength to Special Armed Police as Havildar with their original seniority in SAP and their subsequent promotion as APSI is found irregular and illegal and involves fraudulent practice. It is also stated that the promotion of these officers have created a lot of mental agony and resentment among police

personnel in the Battalions and the Local Police. The Director General of Police further in Ext.P7 ordered their reversion to the AR Camp with their original seniority. It is this order, which is challenged by the petitioners in this case. There is no basis for the statement that fraud was committed by the petitioners, it is submitted. There is no agreement by them to revert them to the post of Police Constable in the Battalion, it is contended. Nobody asked for the written undertaking from the petitioners and no written undertaking was obtained from them, it is stated. They only expressed their willingness to be transferred to Armed Reserve. Necessary formalities were not complied with and if there are laches on their part, they should not be asked to suffer, it is stated. Reference is placed on the decision reported in **Balakrishnan Nair's Case.** It is their case that they were transferred to the Armed Police Battalion in violation of Exts.P1 and P2 orders, which specifically states that transfer to the DAR from SAP can be made only after getting a written undertaking from the incumbent. It was this aspect, which was considered and Ext.P4 was

issued and they were continuing and even promoted to the category of Armed Police Sub Inspector, it is contended. After five years to transfer the petitioners back without even issuing any notice is in violation of principles of natural justice and hence the order passed by the respondent is void and non-est in the eye of law, it is their case. Petitioners were not heard, it is stated. It is stated that only if the petitioners had given their written undertaking agreeing to be reverted, they could be transferred to the Armed Reserve. Learned counsel for the petitioners also relied on the decision of the Apex Court reported in **Shri Krishan v. Kruskshetra University** (AIR 1976 SC 376), wherein the Apex Court held as folows:

> "Where a person on whom fraud is committed is in a position to discover the truth by due diligence, fraud is not proved. It is neither a case of suggestio falsi, or suppressio veri."

2. In the counter affidavit filed, it is inter alia stated as follows:

The petitioners had given written option/willingness on 29.10.1987, 31.10.1987, 5.11.1987 and 10.8.1989. It is further stated that they put in representations after several years seeking transfer back

to the Armed Police Battalion on the basis of their transfer to the City Armed Reserve was without obtaining their written willingness to the effect that they are willing to be transferred to City AR, Thiruvananthapuram on reversion as Police Constables stipulated in the Government Orders. It is stated that they were erroneously reverted back to their parent Battalion without proper examination of the facts of the case. Subsequently they were promoted also. There were writ petitions against their transfer to the Battalion and promotion therein. On scrutiny of the records it was revealed that the petitioners have cheated the department by misrepresentation of facts and got reversion to SAP for getting promotions in the Battalions illegally. It is stated that though petitioners submitted their options/written willingness repeatedly as per the provisions of the Government Orders, they filed representation for re-transfer suppressing the said facts during 1998. It is stated that Exts. P1 and P2 are only guidelines for strict compliance of the directions contained in the Government Orders. It is further stated that confirmation was given to the petitioners only as Police Constables in the department irrespective of the fact whether they are

attached to the Armed Police Battalions or Local Police and irrespective of place of duty is done only once. It is stated that Ext.P4 was erroneously issued without examining all the facts of the case and relying solely on the manipulated request of the petitioners for their reversion back to their parent Battalion. It is submitted that petitioners had already submitted their written willingness and option, which was reported to the Director General of Police, who on receipt of the report from the DIG of Police , APB throroughly examined the matter and Ext.P7 resulted. It is stated that Sri. Sreekantan Nair had not submitted any willingness or option for transfer and posting to City Armed Reserve, Thiruvananthapuram as envisaged in the Government Orders. He was wrongly transferred as Police Constable against his willingness. His representation was verified and it was revealed that the facts mentioned in his petitions were true and correct and hence the transfer was cancelled and he was allowed to join back in the SAP.

3. Reply affidavit is filed, wherein it is inter alia stated as follows:

It is stated that it is nowhere stated in the counter affidavit that

undertaking was obtained from the petitioners and the same was pasted in their Service Book. Willingness is sought to be distinguished from undertaking. It is pointed out that the modalities for transfer was laid down in Exts.P1 and P2. Exts.P8 and P9 are produced as true copies of pro-forma of willingness expressed by petitioners. No pledge undertaking to be reverted is contemplated therein. Reliance is placed on Exts.P1, P2 and P10 to point out that willingness and undertaking are entirely different. They have not given any undertaking as laid down in Exts.P1 and P2 read with Ext.P10. It is stated that they submitted representation to be reverted to the Special Armed Police on the ground that they had not given written undertaking on the basis of Ext.P6 order. They referred to Ext.P6 to show that the Deputy Inspector General who issued the order has also understood that willingness and undertaking have two different occasions. It is stated therefore that for transfer of Havildars to the District Armed Reserve the first step is to fill up the proforma expressing the willingness. After the same is accepted by the authority, after perusing the records before the transfer of a Head Constable from the Special Armed Police to the

District Armed Reserve an undertaking should be obtained from the officer countersigned by the responsible officer and pasted in the service books. Ext.P10 is relied on in this regard. Regarding the averments about Sri. Sreekanthan Nair in the counter affidavit that he had not submitted any willingness, it is stated that it is a fact which is not known to the petitioners. It is stated that it can be seen that in the case of Sri. Sreekantan Nair he had admittedly not given the undertaking, which is clearly stated in Ext.P6. On the said basis, the petitioners who had also not given undertaking, were similarly placed like Sri. Sreekantan Nair. They submitted a representation. They also referred to the following statement in the counter affidavit in W.P.(C) 37778 of 2004, which reads as follows:

> "Since the petitioners had exercised their option during 1987 to the effect they are willing to be transferred to District Armed Reserve as Juniormost Police Constables, fresh undertaking was not obtained at the time of relieving them from Armed Police Battalion to District Armed Reserves. The option given by the petitioners were not cancelled and it has become final."

4. One of the contentions taken by the petitioners is that

petitioners were not put on notice or heard before Ext.P7 was issued. Petitioners were admittedly appointed as Police Constables in the Armed Battalion. They became Havildars in the Battalion. Apparently they expressed their willingness to be transferred to the local police as juniormost police constables (Exts.P8 & P9). By Ext.P3 order dated 7.8.1990 the petitioners were transferred. Going by the case of the petitioners by order dated 17.9.1990 they were admitted to duty after reversion as Police Constables on the basis of Ext.P2 order. They were later promoted as Head Constables in the District Armed Reserve vide order dated 25.10.1995. In Ext.P4 order dated 29.5.1998 it is stated that the undertaking duly counter signed by the responsible officer should be incorporated in their service books and the petitioners transfer to the District Armed Reserve, Thiruvananthapuram is without observing all these formalities and therefore it is in violation of the standing Orders. They were accordingly reverted to the SAP as Havildars without loss of original seniority for all purposes. Ext.P5 dated 3.10.1998 would show that the petitioners were infact provisionally promoted as APSI subject to their inclusion in the

respective years list of Havildars. Ext.P7 dated 23.12.2004, which is impugned in this case, is passed by which it is found that the petitioners actually submitted willingness, their transfer back to the SAP and their subsequent promotions are found irregular, illegal and involves fraudulent practice. The Director General of Police proceeded to revert them to the AR Camp with their original seniority. I would think that the petitioners are entitled to succeed on the short ground that before passing Ext.P7 order petitioners in whose favour Exts.P4 and P5 orders came to be passed by which they were reverted back to the Battalion in the year 1998 without loss of seniority and later on promoted provisionally as ASI came to be reverted back to the Armed Reserve with original seniority without affording an opportunity to the petitioners for showing cause against the proposed action. It is certainly visits the petitioners with civil consequences. It is an order which could have been passed if at all after affording an opportunity of being heard.

In such circumstances, Ext.P7 cannot be sustained and hence it is quashed. However I make it clear that it is open to the respondents to

proceed if so advised, to take a decision in the matter in accordance with law after giving an opportunity of hearing to the petitioners. I am leaving open the other contentions of the petitioners.

(K.M. JOSEPH, JUDGE)

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